No. 81332-9

SUPREME COURT OF THE STATE OF WASHINGTON

RESIDENTS OPPOSED TO KITTITAS TURBINES and F. STEVEN LATHROP,

Petitioners,

v.

STATE ENERGY FACILITY SITE EVALUATION COUNCIL (EFSEC) and CHRISTINE O. GREGOIRE, Governor of the State of Washington,

Respondents.

# REPLY BRIEF OF PETITIONERS RESIDENTS OPPOSED TO KITTITAS TURBINES and F. STEVEN LATHROP

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## I. INTRODUCTION

This court should request the State, the applicant and Amici's attempts to turn this case into a referendum on wind energy. This court should focus instead on its own constitutional jurisdiction; the interpretation and how perception of Chapter 80.50 RCW, an arcane statutory scheme, with Chapter 36.70A RCW, Washington's machine, progressive Growth Management Act; and whether in the race to embrace a popular and attractive technology the State and the Governor abandoned and ignored fundamental principals of fairness and due process.

## II. STATEMENT OF THE CASE

Petitioners, ROKT and Lathrop, do not respond to the applicant, the State and Amici's counter Statement of the Facts and instead directs the court to ROKT and Lathrop's Opening Brief, pages 2 to 17.

## III. ARGUMENT

### A. RCW 80.50.140 Unconstitutionally Vests Original Jurisdiction in the Supreme Court For Review of the Governor's Site Certification Decision.

The threshold issue in this proceeding is whether RCW 80.50.140 unconstitutionally vests original jurisdiction in the Supreme Court to review the Governor's site certification decision. The construct of original and appellate jurisdiction is established by the Washington Constitution – WASH. CONST. article IV, §§ 4 and 6. This court has consistently held

that direct review of administrative determinations by the Supreme Court violates the constitutional mandates. *North Bend Stage Line v. Department of Public Works,* 170 Wash. 217, 16 P.2d 206 (1932) (direct Supreme Court review of orders issued by State Department of Public Works is unconstitutional); and *In re Third Lake Washington Bridge,* 82 Wn.2d 280, 287, 510 P.2d 216 (1973) (direct review of order of Shoreline Hearings Board is unconstitutional). RCW 80.50.140 is unconstitutional.

Article IV, §§ 4 and 6 define the limits of original and appellate jurisdiction. The constitution establishes the Supreme Court as the court of general appellate jurisdiction and the superior court as the court of general original jurisdiction. In *Third Lake Washington Bridge*[1], the court summarized the law as follows:

> This court said in [*North Bend Stage Line*] that jurisdiction of the Supreme Court and of the superior courts is defined in the constitution of this state. The import of that case is that Const. art. 4, ss 4 and 6, render plain the constitutional intent to make the Supreme Court the court of general

[1] The court in *In re Third Lake Washington Bridge* reviewed the constitutionality of RCW 43.21B.200 which authorized direct review by Court of Appeals of an administrative order issued by Shorelines Hearings Board. The statutory construction involved an inconsistency between review procedures in RCW 43.21B (the Pollution Control Hearings Board Act) and those provided in RCW 34.04 (Administrative Procedure Act). The APA provided for administrative review by the superior court based on the record with authority to review alleged procedural irregularities through a hearing process. RCW 43.21C.200 allowed for direct review by the Court of Appeals. The State Department of Highways filed an appeal of the administrative order in superior court and requested that the matter be transferred to the Court of Appeals. The superior court held that jurisdiction lay in Court of Appeals. This Court held that original jurisdiction to review the administrative order is in the superior court and remanded the case for review consistent with that determination.

> appellate jurisdiction, giving to it certain limited original jurisdiction, and to make the superior court the court of general original jurisdiction. The appellate jurisdiction of this court, we said, is jurisdiction over appeals in actions of a purely judicial nature, which have been determined in some judicial court established by the constitution or in pursuance thereof.
>
> Citing and quoting *Winsor v. Bridges,* 24 Wash. 540, 64 P. 780 (1901), we held that jurisdiction to review actions of administrative bodies, in the first instance, is in the superior court and that the legislature may not oust that court of such jurisdiction.

*In re Third Lake Washington Bridge,* 82 Wn.2d at 284-285.

Jurisdiction to review actions of administrative bodies, in the first instance, is in the superior court and the legislature may not oust that court of such jurisdiction. *Winsor v. Bridges,* 24 Wash. 540, 64 P. 780 (1901); *In re Third Lake Washington Bridge,* 82 Wn.2d at 284-285; and *North Bend Stage Line,* 170 Wash. at 225.[2] Appellate jurisdiction vested in the Supreme Court is authority to review appeals from ". . . some judicial court established by the constitution or in pursuance thereof." Appellate jurisdiction does not extend to direct review of administrative orders and

[2] The court in *North Bend Stage Line* found unconstitutional a statutory provision [section 10428 of Remington's Compiled Statutes] that authorized direct review by the Supreme Court of orders issued by the State Department of Public Works. The legislative provision was unconstitutional in two (2) respects: (1) it is unconstitutional because it tends to vest the Supreme Court with original jurisdiction in violation of article 4, section 4; and (2) the provision is unconstitutional ". . . insofar as it assumes to deprive the superior court of its constitutional . . . jurisdiction." *North Bend Stage Lines v. Department of Public Works,* 170 Wn.2d at 227-228.

decisions. RCW 80.50.140 improperly directs initial and original review in the Supreme Court.

Neither EFSEC nor Sagebrush Power acknowledges the constitutional principles articulated in *North Bend Stage Line* or *Third Lake Washington Bridge*.[3] It is argued, however, that the exercise of original jurisdiction pursuant to RCW 80.50.140 is justified on three bases: (1) the procedures established by RCW 80.50.140 are authorized by article II, section 26, of the Washington Constitution; (2) the Court has "discretion" to assume original jurisdiction for review of administrative decisions; and (3) review under RCW 80.50.140 is appellate in nature.

### 1. Article II, Section 26 of the Washington Constitution Does Not Permit the Legislature to Vest Original Jurisdiction in the Supreme Court for Review of the Governor's Energy Facility Siting Decisions

EFSEC contends that the legislature has authority to vest original jurisdiction in the Supreme Court for review of the site certification

[3] EFSEC acknowledged the fundamental proposition that the Supreme Court's appellate jurisdiction ". . . was limited to reviewing the final judgment, order, or decree of some inferior court, not an administrative agency." EFSEC Brief at 10-11. No final judgment, order or decree has been issued by an inferior court in this case. EFSEC did not disagree with the fundamental constitutional mandates (article IV, § § 4 and 6) but debated the reasoning in *Third Lake Washington Bridge* (e.g., the superior court's ability to efficiently conduct focused hearings on the entire record; assignment of a single judge to review large administrative records; the ability to take evidence on alleged procedural irregularities; and the efficiency of developing a record in a full and complete hearing.). (EFSEC Brief at 12-15). Sagebrush Power simply argues that RCW 80.50.140 is different from the statutory structure in *North Bend Stage Line* and *Third Lake Washington Bridge*. Sagebrush Brief at 17.

decision pursuant to article II, section 26 of the Washington Constitution which states that "[t]the legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." The essence of the argument is that article II, section 26 supercedes other constitutional provisions and allows for the legislative expansion and restructuring of judicial authority proscribed by article IV, sections 4 and 6. This interpretation effectively eviscerates the primary constitutional provisions and holdings in *North Bend Stage Line* and *Third Lake Washington Bridge*.[4] No judicial authority has been provided to support this proposition.

As a beginning proposition, the legislature does not have authority to expand or limit judicial authority established by the constitution. The court in *North Bend Stage Line* rejected this proposition:

> Reading the whole of the above-quoted provisions of article 4 of the Constitution, we are led to the conclusion that this is at all events the constitutional limit of the appellate

[4] EFSEC argues that *North Bend Stage Line* is inapplicable ". . . because the court in that case never considered the application of article II, section 26." EFSEC Brief at 10 and 11. The essence of the argument is that article II, section 26 supersedes the conflicting constitutional provisions and authorizes the legislature to expand the scope of the Supreme Court's original jurisdiction. Both *North Bend Stage Line* and *Third Lake Washington Bridge* involve statutory schemes that allowed direct review of administrative decisions by an appellate court. This case involves the same adjudicative process implemented through the executive branch of government. It is illogical to assert that the constitution prohibits direct review of some administrative determinations (e.g., Department of Public Works or Shoreline Hearings Board) but allows original jurisdiction of adjudicative determinations made by EFSEC. There is no logical basis for distinguishing between the wide range of permissible administrative decisions.

> jurisdiction of this court, which the legislature does not have the power either to expand or limit.

*North Bend Stage* Line, 170 Wash. at 222. Article II, section 26 was intended to allow the legislature to establish the method and procedure for suits against the state. The constitutional provision allows for venue determinations, *State ex rel. Shomaker v. Superior Court for King County,* 193 Wash. 465, 469-470, 76 P.2d 306 (1938); procedures for commencement of actions against the state, *Systems Amusement v. State,* 7 Wn.App. 516, 500 P.2 1253 (1972); and matters of sovereign immunity, *Coulter v. State,* 93 Wn.2d 205, 608 P.2d 261 (1980). Not a single case has been cited that supports the proposition that legislative authority under article IV, section 26 may be exercised in a manner that expands or constricts the scope of original and appellate jurisdiction under article IV, sections 4 and 6.

Second, the present action is not a suit ". . . brought against the state." It is a petition for review of a site certification decision similar to judicial review of any administrative determination.[5] Review of administrative decisions have never been characterized as a "suit against

[5] This action is not a "suit" against the state. It is a petition to review an administrative decision. Article IV, section 26 relates to the method and manner of lawsuits against the state. Writ authority is also defined by article IV, sections 4 and 6 of the Constitution. In *North Bend Stage Line,* the proceeding was initiated against ". . . our State Department of Public Works. . . seeking review and reversal of an order that department rendered against the state line." *North Bend Stage Line,* 170 Wash. at 218.

the state." If EFSEC is correct in its argument, the legislature would have authority to establish original jurisdiction in the Supreme Court for direct review of any and all "state" administrative decisions. This proposition was expressly rejected in *North Bend State Line* and *Third Lake Washington Bridge.*

Third, RCW 80.50.140 violates constitutional parameters in two respects: (1) it impermissibly expands original jurisdiction of the Supreme Court (WASH. CONST. art IV § 4); and (2) eliminates original jurisdiction of the superior court. The superior court ". . . is the only court which has original jurisdiction to review acts of administrative bodies." *In re Third Lake Washington Bridge*, 82 Wn.2d at 220. The legislature may ". . . not oust that court of such jurisdiction." *In re Third Lake Washington Bridge*, 82 Wn.2d at 284-285. The court in *Third Lake Washington Bridge* discussed the constitutional rationale for initial review in the superior court. That rationale is equally applicable in this case. *See Wash. State Council of County and City Employees v. Hahn*, 151 Wn.2d 163, 170, 86 P.3d 774 (2004) (quoting *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994)). ("[t]his court's original jurisdiction is governed by the constitution and, by the plain language of the constitution, does not include original jurisdiction on a declaratory judgment action.") The superior court has the inherent power to review administrative decisions

under article IV, section 6 of the Washington State Constitution. *Bridle Trails Community Club v. City of Bellevue,* 45 Wn.App. 248, 251, 724 P.2d 11110 (1986); *WPEA v. Washington Personnel Resources Board,* 91 Wn.App. 640, 657, 959 P.2d 143 (1998). Article II, section 26 does not supersede the provisions of article IV, sections 4 and 6.[6]

### 2. The Supreme Court Is Not Vested with Discretion to Exercise Original Jurisdiction In Conflict With the Constitutional Provisions of Article IV, Sections 4 and 6.

EFSEC and Sagebrush Power next contend that Supreme Court jurisdiction is discretionary under RCW 80.50.140. EFSEC Brief at 12;

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[6] EFSEC argues that the court should retain jurisdiction to consider this matter even if RCW 80.50.140 is determined to be unconstitutional. EFSEC Brief at 11, fn.6. The court in *Third Lake Washington Bridge* addressed ". . . the rationality of our constitutional provisions giving the superior court original appellate jurisdiction over inferior tribunals. . . ." *Third Lake Washington Bridge*, 82 Wn.2d at 285-286 (citing Professor Frank E. Cooper, University of Michigan, Volume 2 of State Administrative Law (1965), a research project of the American Bar Foundation and the University of Michigan Law School." In reviewing the rationale for superior court review of administrative determinations, the court commented:

> These provisions for review at the trial court level, rather than by an appellate court, are significant. They afford the litigant who is aggrieved by an agency ruling a convenient, speedy, and economical method of obtaining judicial review. Further, experiences demonstrated that review at the trial court level is more efficient than is review by appellate court.

*Third Lake Washington Bridge,* 82 Wn.2d at 285. The rationale for the constitutional directives requires remand to the superior court. Second, this case does not meet the standards for acceptance of review under RAP 4.2(a)(4) and RAP 13.4(b)(4). This is not a case of substantial public importance. While the matter is significant to the parties, it is simply a single wind farm project. Kittitas County has already sited one large wind farm and has several pending applications. Wind farm development has been substantial in Klickitat, Benton, Walla Walla and Columbia Counties. No specific motion or record has been developed for determination of matters under the appellate rules.

and Sagebrush Brief at 17-18. The argument is that the Court possesses discretionary review authority that may be exercised even if such action conflicts with article IV, sections 4 and 6. Reliance is placed on the case of *In re Elliott,* 74 Wn.2d 600, 446 P.2d 347 (1968).[7]

*In re Elliott* determined the constitutionality of a statutory provision (RCW 2.60.020) that authorized federal district courts to certify questions of state law directly to the Supreme Court. The legislation provided that ". . . the supreme court shall render its opinion in answer thereto." *In re Elliott*, 74 Wn.2d at 604. The *Elliott* court construed the term "shall" as permissive and found that the exercise of jurisdiction was discretionary with the court. *In re Elliott*, 74 Wn.2d at 607-09. The court recognized the fundamental beginning premise that ". . . the state constitution is a limitation upon the actions and powers of the legislature, instead of a grant of power." *In re Elliott,* 74 Wn.2d at 604. The court in *Elliott* did not address the issues presented in this case.

First, the legislature cannot impose judicial functions or duties that conflict with constitutionally prescribed powers or disparage such duties

[7] The court in *In re Elliott* reviewed the constitutionality of RCW 2.60.020. The legislation authorized a federal court to certify ". . . to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto." The issue was whether the legislation impermissibly expanded the scope of judicial authority and authorized the issuance of advisory opinions. The issues and context reviewed in *In re Elliott* are inapposite to this proceeding.

by placing them elsewhere. *North Bend Stage Line v. Department of Public Works,* 170 Wash. 217, 16 P.2d 206 (1932) (holding unconstitutional a statute authorizing direct appeals of administrative decisions to the Supreme Court because the procedure bypassed and ousted the superior court of jurisdiction under Wash. Const. Article IV, Section 6). RCW 80.50.140 violates this fundamental principle by relocating original jurisdiction for review of administrative decisions from the superior court to the Supreme Court. See *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994) ("This court's original jurisdiction is governed by the constitution and by the plain language of the constitution."). *Elliott* does not authorize the restructuring of original jurisdiction. The superior court is the only court which has original jurisdiction to review acts of administrative bodies. Neither this Court nor the legislature has authority to oust the superior court of original jurisdiction.

Second, Sagebrush Power argues that the court has authority to exercise "discretionary" review authority in contravention of the mandates of article IV, sections 4 and 6. Sagebrush Brief at 18. Reliance is placed on the case of *State ex rel Distilled Spirits, Inc. v. Kinnear,* 80 Wn.2d 175,

492 P.2d 1012 (1972).[8] *Distilled Spirits* dealt with authority to issue a constitutional interpretation in the context of a properly filed mandamus action. The case does not stand for the proposition that the Court has the discretion to issue an opinion any time it believes it would be ". . . beneficial to the public or to other branches of the government." And neither RAP 4.2(a) nor 13.4(b)(4) authorize the circumvention of superior court review and decision. Those rules deal with discretionary review by the Supreme Court of "decisions" of the superior court and court of appeals. This court does not possess "discretion" to hear any case in any manner it deems appropriate. Constitutional structure controls decision-making and it is uncontroverted that review of administrative decisions is vested with the superior court under article IV, section 6 of the Washington Constitution.

### 3. RCW 80.40.140 Does Not Involve the Exercise of Appellate Jurisdiction.

[8] In *Distilled Spirits,* the Supreme Court reviewed a taxpayer's suit testing the constitutionality of laws of 1971, Ex. Ses., ch. 299, § 9, increasing the amount of excise tax imposed upon the sale of certain intoxicating liquors. A writ of mandamus was sought to restrain the collection of the tax. The action was initiated against George Kinnear, Washington State Director of Revenue and Jack Hood, Chairman, Washington State Liquor Control Board. The referenced language relating to review of procedures followed by the legislature in enacting the statute under consideration by the court. The question was specifically whether restraint should be imposed under the "enrolled bill" doctrine. The court proceeded to provide an interpretation of Const. Art. II, § 12. The case does not stand for the proposition that the court may independently exercise discretionary jurisdiction.

Finally, Sagebrush Power argues that direct review under RCW 80.50.140 is simply the exercise of appellate jurisdiction.[9] Br. of Resp. Sagebrush at 16. This argument simply ignores the clear and uncontroverted judicial decisions in this state regarding the constitutional scope and nature of appellate jurisdiction.

First, Sagebrush misconstrues the concept of "appellate jurisdiction" under article IV, section 4 of the Washington Constitution. The court in *North Bend Stage Line* construed the constitutional language and stated as follows:

> Now, recurring to the constitutional appeal jurisdiction of this court, we have seen that such jurisdiction is prescribed to be "in all actions and proceedings," with certain exceptions. This, we are of the opinion, means appellate jurisdiction in "actions and proceedings" of a purely judicial nature, which have been determined in some judicial court established by the constitution or in pursuance thereof.

*North Bend Stage Line v. Department of Public Works,* 170 Wash. at 222. Appellate jurisdiction for constitutional purposes relates to the review of

[9] Sagebrush relies upon the case of *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County,* 135 Wn.2d 542, 958 P.2d 962 (1998). The case stands for the well established proposition that the Supreme Court stands in the shoes of the superior court in reviewing land use decisions. *Skagit Surveyors* involved judicial review of a Growth Management Hearings Board's (GMHB) determination that portions of a county ordinance violated the Growth Management Act (GMA). *Skagit Surveyors,* 135 Wn.2d at 550-551. The Supreme Court's "appellate jurisdiction" is invoked following the issuance of a determination by a judicial tribunal. It does not extend to direct review of administrative determinations. The review and determination by the superior court is required by the constitutional structure.

determinations from inferior judicial courts and not administrative borders. The invocation of appellate jurisdiction requires the review and final decision from the superior court. Appellate jurisdiction does not extend to direct review of administrative decisions. RCW 80.50.140 circumvents the constitutional process and invokes original jurisdiction in the Supreme Court. This process has been clearly rejected in this state. See, also, *In re Third Lake Washington Bridge,* 82 Wn.2d 280, 284-285, 510 P.2d 216 (1973) (". . . we held that jurisdiction to review actions of administrative bodies, in the first instance, is in the superior court and that the legislature may not oust that court of jurisdiction.").

Second, superior court has neither reviewed nor issued a decision regarding the site certification decision. The exercise of original jurisdiction requires such review and appellate jurisdiction is invoked only following such decision. In the absence of a determination by an inferior judicial court, the Supreme Court is not authorized to exercise appellate jurisdiction.

**B. The Governor's Siting Decision is Agency Order in an Adjudicative Proceeding and Reviewable Under RCW 34.05.570(3).**

EFSEC argues that the Governor's site certification is characterized as ". . . other agency action" governed by review standards

under RCW 34.05.570(4). EFSEC Brief at 15-19. This contention is incorrect. "Review of agency orders in adjudicative proceedings" is reviewed under the provisions of RCW 34.05.570(3) (entitled "Review of agency orders in adjudicative proceedings."). [10] Orders 826 and 831, together with the Governor's decision, were the product of an adjudicative proceeding.

RCW 80.50.090(3) specifically provides that EFSEC shall hold a public hearing ". . . conducted as an adjudicative proceeding under Chapter 34.05 RCW, the administrative procedure act." The APA defines "adjudicative proceeding", in relevant part, as "a proceeding before an agency in which an opportunity for hearing before that agency is required by statute ... before or after the entry of an order by the agency." RCW 34.05.010(1). The adjudicative process develops the factual and legal basis for final decision on site certification and preemption. EFSEC Order No. 826 contains Findings of Fact, Conclusions of Law and Order Recommending Approval of Site Certification on Condition. (AR 14257 and 14333). The Governor is presented with the recommendation and a

[10] RCW 80.50.140 provides that "[a] final decision pursuant to RCW 80.50.100 on an application for certification shall be subject to judicial review pursuant to the provisions of Chapter 34.05 RCW [APA] and this section." EFSEC contends that judicial review of "other agency action" under RCW 34.05.570(4). These standards under RCW 34.05.570(4) are reviewed de novo. The determination made regarding the action is (i) unconstitutional, (ii) outside the statutory authority of the agency or the authority conferred by a provision of law, (iii) arbitrary or capricious, or (iv) taken by persons who are not properly constituted as agency officials lawfully entitled to take such action. Notice missing from the review standard is a review for substantial evidence.

proposed site certification agreement. RCW 80.50.100(1). No independent factual or legal determinations are made by the Governor. RCW 80.50.100(2). And no record has been provided by the Governor. The only record was developed in the adjudicative proceedings.

RCW 80.50.100 requires the Governor to act as EFSEC's decision-making authority with respect to energy facility siting decisions. The governor's approval or rejection of the application for site certification is the ultimate decision on the matter and, therefore, for purposes of the RCW 34.05.570, is tantamount to an order. Thus, because RCW 80.50.090 requires the opportunity for hearing before the entry of the agency's ultimate decision, the site certification process falls under the APA's definition of "adjudicative proceeding". Accordingly, RCW 34.05.570(3) provides the applicable standard of review.

### C. The Superior Court's Failure to Take Testimony and Make Factual Determinations Violates RCW 80.50.140.

Thurston County Superior Court failed to take testimony and make factual determinations on alleged irregularities in procedure as required by RCW 80.50.140. All parties agree on this fact. EFSEC and Sagebrush assert, however, that the statutory mandate of RCW 80.50.140 is "discretionary" and that the Superior Court did not abuse its discretion in failing to conduct the required hearing and make mandated factual

determinations. The factual determinations are now the responsibility of the Supreme Court and based upon an incomplete record.[11]

The analysis begins and ends with a review of the clear and unambiguous language of the statute. RCW 80.50.140 provides that ". . . the court *shall proceed to take testimony and to determine such factual issues* raised by the alleged irregularities and certify the petition and its determination of such factual issues to the Supreme Court." The taking of testimony and determination of factual issues is mandatory (i.e., the court "shall") and not discretionary. As a general rule, the use of the word "shall" in a statute is mandatory and creates a duty. *Erection, Co. v. Department of Labor and Industries,* 121 Wn.2d 513, 518, 852 P.2d 288 (1993). Thurston County Superior Court failed to follow the statutory directive and, as a result, the record for review is incomplete. Petitioners have also been denied that opportunity to develop a record on procedural irregularities because of discovery limitations and lack of evidentiary hearing.

The purpose of the statutory process is to assure that a full and complete factual record (including factual determinations by the trier of

[11] Supreme Court is being asked under this analysis to exercise original jurisdiction with respect to certification of the record; assessment of the weight and credibility of factual allegations (without the benefit of hearing); and the ultimate legal impact of those determinations. This is, in essence, the heart of the constitutional issue regarding original jurisdiction.

fact) is available for appellate review by the Supreme Court. RCW 80.50.140. Where there are allegations of procedural irregularities not included in the administrative record, it is clear that certification of the proceeding to the Supreme Court is improper because review cannot be made on the administrative record. RCW 80.50.140.(1). RCW 80.50.140 (certification authorized only if review can be undertaken on the administrative record). The alleged procedural irregularities are serious and extend to the core of the adjudicative hearing process. Those irregularities include the following: (a) a process with the clear and uncontroverted conflicts of interest by councilmembers[12]; (b) improper ex parte communications between EFSEC Chairman James O. Luce and parties or "stakeholders"[13]; (c) improper communications with the

[12] Department of Natural Resources (DNR) and Community Trade and Economic Development (CTED) each had a representative member on EFSEC. DNR was also a direct participant in the application and had entered into agreements to lease state land for the project. The direct financial interest is undisputed and uncontroverted. CTED was granted intervenor status and actively supported the application in adjudicative hearings. It has been argued that there is a "Chinese Wall" in place but no substantive evidence developed with regard to that contention. CTED was an intervenor. Its representative – Tony Usebelli – met regularly with both the EFSEC Chairman and Governor on energy policy. (SR 727-729). Judge Hicks recognized that the "problem" arose for the EFSEC Chairman ". . . because of the many roles that he is playing. . .." (SR 497).

[13] It is undisputed that EFSEC Chairman had ex parte communications regarding preemption with a party. (SR 681-714). Similar communications occurred with intervenor representatives and "stakeholders". "The claim is made that they did not discuss the case but the purpose of the ex parte communication was to advise legal counsel that the Governor had written a letter clarifying her view on preemption authority. The letter was drafted by the EFSEC Chairman and related to the Wild Horse Project in Kittitas County, Washington. (SR 772). At the time of the dialogue and correspondence, the only pending case with a preemption issue was the Kittitas Valley

Governor during the pendency of the adjudicative proceeding[14]; (d) improper discussion of issues and policies outside of the hearing and deliberative process;[15] and (e) improper bias and predetermination of preemption issues.[16] The administrative record contained no developed

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Wind Power Project. (SR 778). And he spoke to "councilmembers" about preemption outside the deliberative process. (SR 776-777).

[14] EFSEC Chairman initiated a dialogue with the Governor's Office following ex parte communications. The ex parte communication regarded preemption and local decision-making processes. (SR 713-717 and 771-778). The issue of preemption arose in the context of the Governor's comments on the Wild Horse Wind Power Project in Kittitas County. (SR 713-714). Testimony was as follows:

> Q. Who raised those questions?
> A. Specifically, I can recall the question was raised by – well, I was asked by Mr. Kahn and Mr. Peeples to inform them, and I believe maybe Mr. Oxley, I will assume that the telephone records are in the same timeframe, after they had heard the Governor's remarks, what did she mean and would there be a clarification, and I said I don't really know exactly what she meant, I will whether there is a clarification that's appropriate.

Chairman Luce made the inquiry and drafted a letter for the Governor regarding preemption. (SR 772). This communication was undertaken at the request of a party and during the pendency of the KVWPP project process. (SR 775-778). A preemption request was pending before EFSEC at the time of the inquiry. (SR 776). KVWPP was the only project with a pending preemption request at the time of the inquiry to the Governor's Office.

[15] EFSEC Chairman acknowledged that it would be improper to engage in communications with EFSEC councilmembers outside of the deliberative process. (SR 771). He denied that such communications took place. That contention, however, is disputed by Declaration of Patti Johnson (SR 1137-1138) and deposition testimony of Chris Smith Towne. (SR 630-634). Both councilmembers advised that such communication occurred and that the EFSEC Chairman was lobbying to put forth his view of preemption authority. It is also clear from the deposition of James O. Luce that he believed the preemption regulation was "ultra vires" and that the failure to exercise preemptive authority would lead to the end of EFSEC. (SR 719).

[16] Chairman Luce viewed the preemption regulation (WAC 463-28-040) as "ultra vires" (SR 720) that EFSEC did not have authority to consider alternative sites that were not under the control of the applicant (SR 723); lobbied the Governor with respect to the

factual record with respect to these issues. A fundamental component of appellate review is missing from the record. Certification to the Supreme Court is prohibited unless certain conditions are satisfied including a finding that review can be made on the "administrative record" and that the record is complete. RCW 80.50.140.

EFSEC argues that the trial court did not abuse its discretion in failing to conduct the required evidentiary hearing and making factual determinations. EFSEC Brief 46-49. It is contended that ". . . the admission or refusal of evidence is largely within the discretion of the trial court and will not be reversed on appeal absent a showing of a manifest abuse discretion." (EFSEC Brief at 47). The process did not reach the point of determinations on the admissibility of evidence. There was no hearing. The statutory regimen requires the taking of testimony and determination of factual matters where there is an allegation of procedural irregularity. RCW 80.50.140 is clear and unambiguous in its directive and requirements. In the absence of a developed record, the Supreme Court does not have a basis for evaluating the alleged procedural irregularities.

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scope of preemption (SR 713-717 and 772-775); participated in regular meetings with "stakeholders" (which included party representatives and intervenor representatives); expressed prejudgment regarding County process (SR 280-284); and express a biased view that ". . . if we don't preempt we are effectively out of business as a 'State siting Council' and should turn siting power projects totally over to local jurisdictions." (SR 291). None of these facts were developed through an adjudicative fact finding process.

EFSEC next argues that ". . . the trial court did not abuse its discretion because Petitioners fail to establish any procedural irregularities." (EFSEC Brief at 47). Petitioners are not required to establish procedural irregularities. RCW 80.50.140 requires that the trial court "take testimony" and make "factual determinations" where there are "alleged procedural irregularities." Kittitas County went beyond mere allegations and presented evidence raising serious questions regarding procedural irregularities.

The Superior Court suspended the statutory process because it did not see a need for further evidentiary testimony ". . . because I don't think there's been a minimum threshold here that substantiates the allegation of impropriety. . . ." (SR 499-500). In effect, the trial court issued an *ad hoc* summary judgment determination regarding both disputed facts and the legal significance of those allegations. The trial court does not possess authority to make either determination under RCW 80.50.140. The responsibility is to take testimony and make factual determinations. The legal significance of such factual determinations is vested with the Supreme Court based upon a complete record.

Kittitas County and ROKT had the right to develop a factual record regarding alleged procedural irregularities. The partial record is riddled with improprieties. That opportunity included the ability to

conduct additional discovery; present witnesses and testimony; and cross examine key witnesses. This right was denied and the record is incomplete for review of many issues critical to the fairness of this process and proceeding.

## D. EFSEC Violated Appearance of Fairness and Due Process Requirements of Fair and Impartial Hearing.

EFSEC argues that the appearance of fairness doctrine has no bearing on this case. EFSEC Brief at 40-46.[17] The appearance of fairness doctrine was judicially established to ensure fair hearings by adjudicative bodies conducting public hearings.[18] *Smith v. Skagit County,* 75 Wn.2d 715, 453 P.2d 832 (1969). The court in *Raynes v. City of Leavenworth,*

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[17] Sagebrush offers no argument or analysis with respect to the application of the appearance of fairness doctrine. The argument is simply that a ". . . brief review of the discovery record confirms that there were no triable issues of fact" and that there is a "presumption that public officials will properly perform their duties." Sagebrush Brief at 19-22. It may be inferred from argument that Sagebrush Power acknowledges that the appearance of fairness doctrine is applicable to this proceeding.

[18] The appearance of fairness doctrine has been codified as it relates to "local land use decisions." RCW Ch. 42.36. RCW 42.36.010 provides:

> Quasi-judicial actions of local decision-making bodies are those actions of a legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.

The statutory provisions of RCW Ch. 42.36 do not apply to the present proceeding. The appearance of fairness determinations are based upon the judicially established appearance of fairness doctrine.

118 Wn.2d 237, 245-246, 821 P.2d 1204 (1992) set forth the doctrine requirements as follows:

> The doctrine requires that public hearings which are adjudicatory in nature meet two requirements: the hearing itself must be procedurally fair, *Smith,* at 740, 453 P.2d 832, and it must be conducted by impartial decision-makers. *Buell v. Bremerton,* 80 Wn.2d 518, 523, 495 P.2d 1358 (1972). The doctrine provides:
>
> > It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.

*Smith v. Skagit County,* 75 Wn.2d at 739, 453 P.2d 832; *Narrowsview Preservation Ass'n v. Tacoma,* 84 Wn.2d 416, 420, 526 P.2d 897 (1974); and *Buell v. Bremerton,* 80 Wn.2d 518, 523, 495 P.2d 1358 (1972). The appearance of fairness doctrine is satisfied only ". . . if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial and neutral hearing." *Organization to Preserve Agricultural Lands v. Adams County,* 128 Wn.2d 869, 889. 913 P.2d 793 (1996). See, also, *Swift v. Island County,* 87 Wn.2d at 361.

EFSEC conducted an adjudicatory hearing that was a condition precedent to the exercise of preemption authority and execution of a site certification agreement. RCW 80.50.090(3). EFSEC argues that the appearance of fairness doctrine does not apply for four (4) separate

reasons: (1) the adjudicative proceeding conducted by EFSEC was not a quasi judicial process; (2) the presence and participation of designees from DNR and CTED did not violate the doctrine; (second and third reasons); and (3) Petitioners have failed to present evidence of actual or potential bias. None of the stated reasons defeat the application of the appearance of fairness doctrine.

### 1. EFSEC Conducts An Adjudicative Hearing Process That is Subject to Appearance of Fairness Doctrine.

EFSEC first argues that EFSEC's consideration of the site certification application ". . . is not quasi-judicial." EFSEC Brief 40-48. Washington Courts employ various tests to determine "whether administrative action is functionally comparable to judicial action and therefore quasi-judicial." *Taggart v. Sandau,* 118 Wn.2d. 195, 205, 822 P.2d 243 (1992). The analysis has focused on the distinction between legislative and judicial actions.[19] In determining whether a particular

[19] In the seminal case of *Raynes v. City of Leavenworth,* 118 Wn.2d 237, 243, 821 P.2d 1204 (1992), the court recognized that the distinction between legislative and quasi judicial actions was significant in two (2) respects: (1) the issuance of a writ of review was permitted only with respect to quasi judicial determinations; and (2) the appearance of fairness doctrine applied to quasi judicial proceedings. The court noted:

> Because of the circumstances of this case, we are confronted by a peculiar consequence. Both the propriety of issuing a writ of review and the applicability of the appearance of fairness doctrine turn on our determination that the proceedings to amend the Leavenworth zoning code were either legislative or quasi-judicial in nature. This determination of the nature of the proceedings before us is fundamental to our ability to make the appropriate decision.

matter is quasi judicial, the Court has directed that a flexible approach be taken giving ample consideration to the functions being performed by the subject body. The court in *Raynes v. City of Leavenworth* stated:

> No clear line can be drawn between judicial, legislative and administrative functions of local decision-making bodies. Judicial actions have no single essential attribute. Instead, a number of factors are important to the determination. If a given proceeding of a decision-making body has a sufficient number of relevant characteristics, it may be considered quasi-judicial in nature. *Taggart v. State,* 118 Wn.2d 195, 822 P.2d 243 (1992), argued October 16, 1990. Thus, no test should be rigidly applied. Rather, a flexible approach should be employed which gives ample consideration to the function being performed by the decision-making body.

In *Raynes,* the court distinguished rezoning actions, which involve the rights of specific parties and do not have area wide significance, from legislative actions, which have area wide significance.

First, it is clear and undisputed that EFSEC conducts an "adjudicative proceeding" under the Administrative Procedures Act

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*Raynes v. City of Leavenworth,* 118 Wn.2d at 243. EFSEC relies on *Washington Public Employees Association v. Washington Personnel Resources Board,* 91 Wn.App. 640, 959 P.2d 143 (1998). The WPEA case did not include issues related to the application of the appearance of fairness doctrine. Rather, the court reviewed the requirements for issuance of a writ of review of an administrative dismissal of unfair labor practice complaints. It must also be recognized in *Raynes* that different considerations are applicable in the context of writs of review and appearance of fairness. *Raynes v. City of Leavenworth,* 118 Wn.2d 244 ("A 4-part test has been developed to determine when a given action is quasi judicial or legislative in relation to the writ."). A separate analysis was applied with respect to the applicability of the appearance of fairness doctrine under RCW 42.36.010.

(APA). RCW 80.50.090(3). The public hearing process reviews a site specific application; includes readily identifiable parties with conflicting interests; is administered by an administrative law judge; applies rules of evidence and administrative procedures; and ultimately enters findings of fact, conclusions of law and recommendation on site certification.[20] The process is essentially a land use proceeding and the courts have consistently characterized such proceedings as "quasi-judicial."[21] See,

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[20] EFSEC attempts to distinguish and minimize the adjudicative process. It does recognize, however, the following:

> RCW 80.50 involves a multi-faceted process by which EFSEC develops a recommendation to the Governor regarding applications to site, construct and operate energy facilities. EFSEC develops and applies environmental conditions regarding the type, design, location, construction and operational conditions of the project. RCW 80.50.040(2). It obtains and evaluates independent scientific and technical studies of projects. RCW 80.50.040(6). It develops project-specific siting criteria and drafts certification agreements for proposal to the Governor. RCW 80.50.040(8). . . . It conducts public information and *land use hearings and such other hearings as it deems appropriate,* along with various other public meetings as a part of the environmental permitting and in compliance with SEPA. RCW 80.50.090.

EFSEC Brief at 41. It also makes determinations on admissibility of evidence; weighs the weight and credibility of testimony and evidence; evaluates and enters conclusions of law; and otherwise conducts an adjudicative proceeding. It has been recognized that the determination of legal rights and interpretation of legal questions is a judicial function. *WPEA v. Washington Personnel Resources Board,* 91 Wn.App. 640, 647-648, 959 P.2d 143 (1998).

[21] The following summary argument was offered by EFSEC:

> EFSEC's activities do not resemble the ordinary business of courts. They represent the ordinary business of the executive branch performing administrative functions. . . . The fact that the hearing is to be "conducted as an adjudicative proceeding" does not convert what is an administrative matter into a quasi judicial one.

e.g., *Swift v. Island County,* 87 Wn.2d 348, 552 P.2d 175 (1976) (review of preliminary plat and environmental determinations); *Chrobuck v. Snohomish County,* 78 Wn.2d 858, 480 P.2d 489 (1971) (rezoning to allow heavy industrial usage by Atlantic Richfield Company); and *Organization to Preserve Agricultural Lands v. Adams County,* 128 Wn.2d 869, 913 P.2d 793 (1996) (unclassified use permit application authorizing site for regional landfill). Adjudicative procedures are established for the proceeding (RCW 34.05.410-.470) including pleadings, briefs, motions and service (RCW 34.05.437); intervention (RCW 34.05.443); rules of evidence (RCW 34.05.452); ex parte communications (RCW 34.05.455); entry of orders (RCW 34.05.461); and reconsideration (RCW 34.05.470). If the EFSEC process is not quasi-judicial, nothing is.

Second, the adjudicative process is neither legislative nor administrative. See, e.g., *Westside Hilltop Survival Comm. v. King County,* 986 Wn.2d 171, 176, 634 P.2d 862 (1981) (revision of community plan that serve as blueprint and policy statement); and *Harris v. Hornbaker,* 98 Wn.2d 650, 658-59, 658 P.2d 1219 (1983) (action was

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EFSEC Brief at 42. This process was not the "ordinary business of the executive branch performing administrative functions." It was a serious judicial proceeding that determined site specific certification of a massive industrial facility; impacted the property and residences of countless nonparticipating citizens; and preempted a valued local decision-making process. it was a judicial proceeding and participants are entitled to a process free from conflicts of interest, prejudgment, bias and ex parte communications.

legislative because ". . . [t]he Board's responsibility was not to decide which of the two groups . . . made the best argument; . . .").[22] The process is judicial. There is legislative or administrative process taking place.

EFSEC clearly functioned as a body that made decisions among competing groups. Sagebrush submitted a land use application and site specific determinations were made by the Governor based on the adjudicative record. And most significantly, the decision invoked preemption which legally superseded an unappealed local determination. These are clearly judicial processes and determinations.

### 2. Participation by DNR and CTED Representatives Violates the Appearance of Fairness Doctrine.

EFSEC next argues that even if the appearance of fairness doctrine applies there has been no violation in this proceeding. EFSEC Brief at 43-46. Lathrop raised the issue of agency conflicts in the adjudicatory hearing. EFSEC and the conflicted agency representatives refused to recuse themselves despite patent conflicts of interest. Council Order Nos. 778, 781, 782 and 783. (AR 14605-14171).

[22] Contrary to the argument offered by EFSEC, the court in *Harris v. Hornbaker* did not hold that adjudicative proceedings cannot be quasi judicial. Instead, the court recognized the classification of a decision as legislative or adjudicative does not necessarily depend on the type of decision-making body. 98 Wn.2d at 657. The case simply illustrates the proposition that the nature of decision-making defines the application of the appearance of fairness doctrine.

First, EFSEC argues that ". . . the presence of a designee from CTED and DNR as members of EFSEC does not violate the doctrine." EFSEC Brief at 43. Since the presence of these members is required by the legislature, it is contended that participation by representatives with clear conflicts of interest cannot be a violation of the appearance of fairness doctrine.[23] No substantive authority is offered in support of this proposition. There is no dispute that clear and identified conflicts of interest exist – DNR has a financial interest in the application (AR 2389) and CTED was granted intervenor status (as advocate for both the project and preemption). This type of conflict has clearly been found to violate the appearance of fairness doctrine. *Narrowsview Preservation Ass'n v. Tacoma,* 84 Wn.2d 416, 526 P.2d 897 (1974) (member employed by entity that would benefit by decision); and *Save A Valuable Environment v. Bothell,* 89 Wn.2d 862, 576 P.2d 401 (1978) (association with organization supporting application). If EFSEC's analysis was correct, every elected official or appointed quasi judicial officer would be immune

[23] EFSEC argues that participation by designees from CTED and DNR ". . . does not constitute a violation of the doctrine because the Legislature required EFSEC to include a member from CTED and DNR. RCW 80.50.030(3)(a)." EFSEC Brief at 43. It is contended that the legislature has authority to override the application of the appearance of fairness doctrine. First, the constitution of a decision-making body does not infer the fundamental attributes of a fair hearing and decision-making process have been suspended or superseded. Second, the logic of this argument would lead to the elimination of the appearance of fairness doctrine in virtually every setting. There is not a single decision-maker that serves other than through election or appointment. All decision-makers derive their authority through a statutory or ordinance process.

from the application of the appearance of fairness doctrine because his or her presence was required by a legislative enactment. It is incongruous to assert that this fundamental fairness doctrine is rendered meaningless if there is a statutory procedure for appointment of decision-makers. DNR had a direct financial interest in the project and application. (AR 2358-2393). Payments had been received in advance of the hearing. (AR 2389). The presence of a direct financial interest certainly creates an "appearance" of potential bias and partiality.

Second, it is argued that the appearance of fairness doctrine is not violated when one representative of an agency is a decision-maker and another is granted intervenor status. EFSEC Brief at 44.[24] The conflict is elevated in this case where the agency advocate (Tony Usebelli) and party attorney (Darrell Peeples) also actively meet on energy matters with the EFSEC Chairman. (SR 728-731). CTED advocated for the project and the exercise of preemption. It is incongruous to conclude that a decision-maker is not unduly influenced by the position taken by their department

[24] EFSEC relies upon *Washington State Medical Disciplinary Board v. Johnston,* 99 Wn.2d 466, 663 P.2d 457 (1983) for the proposition that there's no inherent unfairness in the combination of investigative and adjudicative functions. The analysis in *Johnston* is inapposite in this proceeding. CTED sought and was granted intervenor status and acted as a project advocate throughout the proceeding. Subsequent discovery also disclosed that the CTED representative (Tony Usebelli) actively met on energy matters with the EFSEC Chairman. (SR 728-729). It is fundamentally unfair (both in fact and appearance) that an agency is both an advocate and decision-maker.

ad agency counterpart. The conflict is patent and extends well beyond appearance.

### 3. Evidence Is Contained in the Record Supporting the Violation of Appearance of Fairness Doctrine.

EFSEC argues that a party ". . . must present evidence of actual or potential bias to support an appearance of fairness claim." EFSEC Brief at 45. ("Petitioners have not met the burden of proof.") First, Lathrop identified the specific conflicts during the adjudicative process. (AR 2360 and 2431). DNR's property and financial interest was substantiated in the record. (AR 388). Second, CTED's conflict is patent – decision-maker and advocate. Both conflicted representatives participated and voted on site certification. And not surprisingly, both voted in a manner consistent with their respective departments' financial interest and advocated position. Third, other conflicts, bias, prejudice and improper communications were first discovered following the closure of the adjudicative process. That information was not disclosed during the hearing process and became available only following Kittitas County's submission of Public Disclosure Act (PDA) requests to EFSEC. (SR 276-329).

Petitioners were denied the opportunity to fully develop these issues by the trial court's summary termination of fact finding processes

under RCW 80.50.140. And finally, and perhaps most significant, is the recognition that the doctrine does not require proof of actual bias but only the presence of an interest." ". . . which might have influenced a member. . . ." *Narrowsview Preservation Association v. Tacoma,* 84 Wn.2d 416, 420, 526 P.2d 897 (1974). A financial interest in the outcome and advocacy of the agency appointing the councilmember clearly have the appearance of influencing the decision-maker. No reasonably prudent person would find such conflict to be consistent with the concept of a fair hearing.

## E. EFSEC Improperly Exercised Preemption Authority in Conflict With Growth Management Act (GMA).

The adoption of the Growth Management Act (GMA) represented a pervasive and fundamental restructuring of land use planning in the State of Washington. See, generally, Settle and Gavigan, *The Growth Management Revolution In Washington: Past, Present and Future*, 16 U. Puget Sound L. Rev. 867 (1997). Professor Settle commented:

> The GMA establishes statewide goals that embody important and controversial policy choices for the accommodation of future growth. The GMA does not impose state plans and development regulations. Instead, GMA counties and cities are required to adopt land use and public facility plans, development regulations, and capital facility programs designed to achieve state goals that are consistent with state substantive and procedural requirements. The state's role is limited to support and

> enforcement, while local governments must endure incessant, acrimonious debate, make extremely difficult political choices, and formulate complex plans and regulations. . . . Under Washington's "bottom-up" system, the central locus of decision-making at the local level, the operational substantive growth management requirements will emerge as local governments implement the GMA.

16 U. Puget Sound L. Rev. at 896-897.

The clear purpose and intent of the GMA was to integrate land use planning at the local level with a "bottom up" planning process. The planning structure and process was built upon public participation and local discretion. RCW 36.70A.020 and .3201. RCW 36.70A.010 provides, in part, as follows:

> The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning.

Kittitas County engaged in a thoughtful citizen based comprehensive planning process. Of specific import in that process, was the development and adoption of ordinances and processes governing the siting of alternative energy and wind farm projects. (AR 715 and 1246).

The process did not prohibit or place unusual obstacles in the path of a proposed project. Virtually all of rural Kittitas County was potentially available for such projects. (Agriculture – 20, Forest and Range, Commercial Agriculture and Commercial Forest Zones – AR 1251). KCC Ch. 17.61A was circulated to state agencies and to Department of Community, Trade and Economic Development (CTED). No objections to the process or adopted development regulations were registered by any agency or private party. And no appeal was filed with respect to the legislation. The legislation became final and binding with respect to review and decision-making processes.

Kittitas County utilized the adopted GMA process and has successfully sited one large wind farm project – Wild Horse Wind Farm Project. The facility was sited under the same ordinance and procedures as utilized in this case. Three (3) other applications are pending within the County. The process allows for the site specific assessment of project impacts and mitigation. Not every site is suitable for a wind farm and review is the functional equivalent of a conditional use permit proceeding. GMA requires that the local processes be respected and local decisions afforded substantial deference. RCW 36.70A.3201.

### 1. Growth Management Act (GMA) and RCW 80.50.110 Are Consistent and There Has Been No Implied Repeal.

Sagebrush Power argues that Growth Management Act (GMA) improperly and unconstitutionally repealed RCW 80.50.110. Sagebrush Brief at 25-27. That analysis is incorrect. As a beginning proposition, this is not a case about "repeal" but rather a case requiring construction of two separate statutory schemes. And the answers are found within the express language of the statutes. The Growth Management Act (GMA) does not modify the State Energy Facilities Site Evaluation Council (EFSEC) and the two statutes are harmonious.

The Washington legislature enacted Growth Management Act (RCW 36.70A.120) to ensure comprehensive planning. *Jensen v. City of Everett*, 109 Wn.App. 1048, 1052 (2001). EFSEC is a state agency that administratively evaluates energy facility site applications. *Lathrop v. State Energy Facilities Site Evaluation Council,* 130 Wn.App. 147, 149, 121 P.3d 774 (2005). EFSEC legislation specifically recognizes that subsequently adopted state legislation will supersede its provisions. RCW 80.50.110(1) provides as follows:

> If any provision of this chapter is in conflict with any other provision, limitation, or restriction which is *now in effect under any other law of this state, or any rule or regulation promulgated thereunder,* this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for purposes of this chapter.

(Italics added). The statutory language specifically omitted reference to later enacted state legislation.[25] This statute became effective in 1970 and explicitly provided that it superceded all laws "now in effect." RCW 80.50.110(1) specifically recognized that subsequently adopted state legislation would control the subject matter. GMA was subsequently adopted and established special procedures for land use planning including essential public facilities.

Second, Growth Management Act (GMA) also made it clear that "state agencies" are required to comply with the provisions of adopted comprehensive plans and development regulations. RCW 36.70A.103 provides as follows:

> *State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter* except as otherwise provided in RCW 71.09.250(1) through (3), 71.09.342, and 72.09.330.
>
> The provisions of Chapter 12, Laws of 2001, 2nd Sp. Sess. do not affect the state's authority to site any other *essential public facility* under RCW 36.70A.200 *in conformance*

[25] EFSEC argues that the words "now in effect" were taken out of context and simply reflect a legislative intent to supersede existing legislation. (EFSEC Brief – 27-28). It is argued that it ". . . would be anomalous for the Court to construe these words to have exactly the opposite effect as intended." There is no question that RCW 80.50.110(1) was intended to supersede conflicting state legislation that was in effect at time of adoption of RCW 80.50.110(1). If the legislature intended to supersede future legislation, it would have added the words ". . . or as hereinafter adopted or enacted." Those words are noticeably absent from the statutory language. The clear intent was to recognize and authorize future legislatures to adopt legislation that was appropriate at the future time.

> *with local comprehensive plans and development regulations adopted pursuant to Chapter 36.70A RCW.*

(Italics added). EFSEC is a state agency with authority for rule making, adjudication regarding site certification applications and a variety of other powers. RCW 80.50.040. RCW 36.70A.103 specifically and unambiguously recognizes that (1) state agencies shall comply with local comprehensive plans and development regulations; and (2) the siting of essential public facilities must be in conformity with such local plans and regulations.[26] The legislative directive is clear and unambiguous. Where a statute is clear on its face, its meaning is derived from the language of the statute alone. *Seto v. American Elevator, Inc.,* 159 Wn.2d 767, 772, 154 P.3d 882 (2007); and *Killian v. Atkinson,* 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

Third, Growth Management Act (GMA) did not specifically reserve or incorporate statutory authority and processes under RCW Ch. 80.50. In *Biggers v. City of Bainbridge Island,* 162 Wn.2d 683, 700, 169 P.3d 14 (2007) the Court held that GMA integrated and preserved Shoreline Management Act (SMA) authority. See, RCW 36.70A.480. No similar reservation or reference is included with respect to RCW Ch.

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[26] The exceptions noted in the statute – RCW 71.09.250(i) through (3), 71.09.342 and 72.09.330 – relate to the construction of treatment and transition facilities for sex offenders. No exception is created for energy facilities subject to EFSEC jurisdiction.

80.50. It is also significant that the definitions of "land use plan" and "zoning ordinance" were not amended by the legislature until 2006 to incorporate plans and development regulations adopted under GMA. RCW 80.50.020(16) and (17). Laws of 2006, Ch. 205 § § 16, 17.[27] Sagebrush application predated the statutory reference to GMA plans and regulations. Such amendment is prospective and inapplicable to this proceeding.

**2. GMA Requires Planning and Siting Authority For Essential Public Facilities. RCW 36.70A.200.**

Growth Management Act (GMA) contains a statutory directive that local jurisdictions ". . . shall include a process for identifying and siting essential public facilities." RCW 36.70A.200(1). See generally, Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future,* 16 U. Puget Sound L. Rev. 867, 939-940 (1993). No local comprehensive plan or development regulation may preclude the siting of essential public facilities. RCW 36.70A.200(5). The broadest view should be taken of what constitutes a public facility. *City of Des Moines v. Puget Sound Regional Council*, 108 Wn.App. 836, 846, 988 P.2d 27 (1999). WAC 365-195-340(2)(a)(i) provides:

[27] In the 2006 session, the legislature amended RCW 80.50.020(15) and (16) by adding references to comprehensive plans and zoning ordinances adopted under the GMA. The GMA reference did not exist in prior legislation which governed the present application.

> In the identification of essential public facilities, *the broadest view should be taken of what constitutes a public facility*, including the full range of services to the public provided by government, substantially funded by government, contracted for by government, *or provided by private entities subject to public service obligations*.

(Italics added) RCW 36.70A.200 provides:

> Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities as defined in RCW 47.06.140, state and local correctional facilities, solid waste handling facilities, and in-patient facilities including substance abuse facilities, mental health facilities, group homes, and secured community transition facilities as defined in RCW 71.09.020.

EFSEC argues that "a privately owned wind power facility is not an essential public facility." EFSEC Brief -32. WAC 365-195-340 (2)(a) specifically recognizes that private entities can own essential public facilities. Many of the facilities identified in RCW 36.70A.200 are privately owned or operated (*e.g.* solid waste handling facilities, substance abuse facilities, group homes and secured community transition facilities). The statutory and regulatory structure clearly contemplates that essential public facilities may be either publicly or privately owned and/or operated.[28] In *City of Des Moines v. Puget Sound Regional Council,* 108

[28] EFSEC asserts that a "privately owned wind power facility is not an 'essential public facility' as that term is used in RCW 36.70A.200." (EFSEC Brief at 32). The statutory and regulatory language clearly cover both public and privately owned facilities. EFSEC goes on to state that CTED's rules provide ". . . no comprehensive plan may directly or

Wn.App. 836, 846, 988 P.2d 27 (1999), the court adopted an expansive view of the term essential public facilities and determined that it included necessary off site support activities.

Second, the regulations recognize that an essential public facility includes operations" ...provided by private entities subject to public service obligations." Washington courts have repeatedly held that condemnation of private property by utilities to generate electric power is a public use. *Public Utility District No. 2 of Grant County v. North American Foreign Trade Zone Industries, Inc.*, 159 Wn.2d 555, 573, 151 P.3d 176 (2007); *Dickgeiser v. State*, 153 Wn.2d 530, 537, 105 P.2d 26 (2005). Electric utilities and generation can be provided by private companies subject to public service obligations. As such, the facility is an essential public facility.

Third, the project is also a public facility since wind towers will be located on public lands owned and managed by Department of Natural Resources. The operation of an enterprise that benefits the public (*i.e.* pays funds into state trust account) is a public use. *Dickgeiser v. State*, 153 Wn.2d 530, 537-539, 105 P.3d 26 (2005); and *Boitano v. Snohomish*

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indirectly preclude the siting of essential public facilities." WAC 365-195-340(2)(c). EFSEC Brief at 32. Kittitas County's regulatory scheme does not preclude the siting of an essential public facility. Rather, it establishes a process by which essential public facilities are reviewed and permitted. The fact is that Kittitas County has cited a wind farm project.

*County*, 11 Wn.2d 664, 668, 120 P.2d 490 (1941). A wind farm is an essential public facility and GMA established a specific procedure for siting such facilities.

Kittitas County followed GMA procedures for essential public facilities; allowed for the siting of such facilities (*i.e.* did not prelude the siting); and exercised such control in the context of Growth Management Act (GMA). (AR 1246). The comprehensive plan and development regulations were forwarded to Community Trade and Economic Development (CTED) for review and approval. No objections were registered to the planning provisions and no appeals filed with the Eastern Washington Growth Management Hearings Board (EWGMHB). Those rules and regulations established a specific procedure for siting of wind energy facilities and such development regulations are final and binding on the parties and applicable in this proceeding. The application of purported preemption authority eliminates a required planning process contemplated by GMA.

### F. Exercise of Preemption Was Contrary to Statutory and Regulatory Authority.

All parties agree WAC 463-28-040 is applicable and proscribes the exercise of preemptive authority.[29] Kittitas County Wind Power Project is governed by the law and regulations in place at the time of application.[30] However, EFSEC Chairman Luce viewed preemption in a context fundamentally distinct from the regulatory structure. Mr. Luce viewed WAC 463-28-040 as "ultra vires" (SR 719) and if ". . . we don't preempt we are effectively out of business." (SR 291). The Chairman carried the lobbying effort outside of the deliberative process (Declaration of Patti Johnson, SR 1137-1138 and Deposition of Chris Smith Towne, SR 620-621). And these views were pervasive even before the commencement of the adjudicative hearing. (SR 279-284) (put down thoughts regarding preemption on February 24, 2004).

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[29] Sagebrush Power recognized that WAC 463-28-040 set forth ". . . steps [which] were an administratively imposed prerequisite to the exercise of state preemption." Sagebrush Power Brief – 34. EFSEC Brief 32-33 (recognizing that rules in effect at time of application are controlling).

> Under EFSEC's rules in effect when the Kittitas Valley Wind Power Project application was filed, EFSEC was required to consider four factors in making its recommendation to the Governor about whether land use laws should be preempted. WAC 463-28-040.

(EFSEC Brief 32-33).

[30] Sagebrush (or its predecessor) filed an Application for Site Certification with EFSEC on January 13, 2003. EFSEC reviewed and processed Application No. 2003-01 ". . . pursuant to the provisions of Title 463 of the Washington Administrative Code in effect on January 13, 2003." Council Order No. 826, p.7, fn.1. The applicant refers to WAC in effect on January 13, 2003 as the "former" rule. Applicant's Brief page 34. The WAC nonetheless applies to the applicant and the applicant knows that. During the evidentiary hearing the issue of which version of the WAC applied came up. The ALJ concluded the "former" version did.

WAC 463-28-040 sets forth the criteria governing exercise of preemptory authority. The exercise of preemption requires (1) that applicant has demonstrated a good faith effort to resolve noncompliance issues; (2) applicant and local authorities are unable to reach agreement; (3) alternate locations within the same county have been reviewed and found unacceptable; and (4) interest of the state under RCW 80.50.010 have been considered in the determination process.

**1. Applicant Failed to Establish Good Faith Effort to Resolve Issues of Land Use Consistency at Local Level.**

It is uncontroverted that Sagebrush withdrew from the land use review process before Kittitas County. Applicant failed to submit the required development agreement and contended that contemplated setbacks were "economically unviable." The hearing record is detailed in our opening brief.

It is contended that information on economic viability is irrelevant. First, the applicant made this information directly relevant when it took the position that further increases in the set back distance would affect the economics of the project. Kittitas County did not introduce this subject. Sagebrush drew a line in the sand and refused to substantiate its claim of economic unviability. Kittitas County proposed setbacks on the basis of site inspection (hilly terrain), proximity to residences and investigation of

other wind farms. Sagebrush also refused to explain why previously proposed internal string locations without setback issues could not be utilized.

Second, information on the economics of the project and the cost of operating the facility are directly relevant when evaluating alternative sites. *Gebbers v. Okanogan County Public Utility District*, _____ Wn.App. _____, 183 P.3d 344 (2008)("Similarly, under NEPA, an EIS must contain sufficient economic information to enable an accurate assessment of alternatives and informed decision."). See also *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987)(subjective good faith is not a test for EIS review). The economic analysis "need not be exhaustive, but must merit sufficient information for a reasoned choice." *Id.* at ¶ 42; *see also, Solid Waste Alternative Proponents (SWAP) v. Okanogan County,* 66 Wn. App. 439, 442, 832 P.2d 503 (1992). Kittitas County was justified in its request for substantiation of the purported basis for withdrawal. And Governor Gregoire felt the issue was of such significance that it merited remand. In the end, the substantiation was refused. Perhaps the reason for refusal was that the claim could not be supported by facts.

Because the preemption criteria requires an analysis of Alternative locations the economic information was directly relevant and the applicant's refusal to provide the information was not good faith.[31]

### 2. EFSEC Improperly Interpreted and Applied the Alternative Site Criteria of WAC 463-28-040(3).

EFSEC's preemption authority may only be properly exercised if ". . . alternate locations . . . within the same county . . . have been reviewed and have been found unacceptable." WAC 463-28-040(3). EFSEC failed to properly interpret and apply this provision. EFSEC failed to examine alternative locations and instead improperly limited its focus to locations within the control of this applicant.

EFSEC also established criteria for analyzing alternate sites and stated:

> The criteria for analyzing alternate sites consisted of:
>
> 1) Sufficient wind resource (the most important factor);
> 2) Proximate/adequate transmission facilities;
> 3) Large land areas;
> 4) Absence of significant environmental constraints; and
> 5) The property owner interest/property availability/control of property.

[31] The Governor, in her letter seeking additional information, recognized the significance of this information when she requested the information. (AR 11390-11391). The applicant, in response to the Governor's request, refused to provide the information.

> The Draft Supplemental EIS concluded that although other sites for wind power generation may exist in Kittitas County, *none would satisfy the test for availability or practicability (fifth factor) for the Kittitas Valley Wind Power Project. Furthermore, competing companies are proposing to develop some of these alternate sites, making these locations unavailable to the Applicant.*

Council Order No. 826 at 22-23.[32] The FEIS recognized six (6) alternate locations with comparable wind energy production values. (AR 9710, p.2-42 to p.2-80). Electricity demand in the region over the next 20 years is less than one percent per year. FEIS 1-8. The test is not whether a site is "available" to an applicant but whether alternate locations exist and have been found to be unacceptable. EFSEC's own logic – that competing companies are proposing to develop some of these alternate sites – clearly establishes the availability of alternate locations.

The alternate site analysis for state energy purposes must focus on alternate sites for the production of electricity – not the economic viability of a private application. The State interest is set forth in RCW 80.50.010, which provides:

> It is the policy of the State of Washington to recognize the pressing need for increased energy facilities, and to ensure through available and reasonable methods, that the location and operation of such facilities will produce minimal

[32] The five EFSEC criteria are not included in WAC 463-28-040. EFSEC created these criteria without going through rule making in violation of *Hillis v. Ecology,* 131 Wn.2d 373, 399, 932 P.2d 139 (1997). (When Ecology set out priorities for decisions related to processing groundwater applications, Ecology should have engaged in rule making so the public has input). The remedy is invalidation of the action. *Id.* at 399.

> adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

The State's interests also include the provision of abundant energy at a reasonable cost; preservation and protection of the quality of the environment; and meeting energy demands in the State of Washington. Each of the identified purposes can be achieved by alternate locations identified within Kittitas County. Kittitas County had already sited a facility (Wild Horse); had three pending applications; and competitors controlled other viable sites. Preemption should not (and cannot) be exercised simply to help a private company compete with other developers and be "economically viable."

EFSEC engaged in no specific analysis of alternate locations. It simply relied upon the characterizations provided by Applicant.

> *According to the Applicant,* it did consider other locations in the County but did not find any acceptable alternatives to the proposed site. The *Applicant believes* there is no other site with a wind resource as robust and as well documented by long-term on-site data. Further, *the Applicant notes* the presence of multiple transmission lines of appropriate voltage and adequate capacity to carry the entire output of the Project, with no new feeder line construction required. In addition, *the Applicant points out* its existing land agreements with participating landowners securing the ability to use this site. Finally, *the Applicant correctly notes* that under current Kittitas County Land Use Regulations, there are no pre-approved zones or specific sites for constructing wind farms in the entire county. . . . Finally, the Applicant's lack of control of the property at

> any of the alternative sites *creates the most significant complication* in finding any of the other possible sites acceptable.

(AR 14279). EFSEC simply relied upon Applicant views and statements with respect to alternate locations. No independent assessment was undertaken with respect to these matters. No economic analysis as required in *Gebbers, supra*, was done. This type of analysis effectively changes the criteria to eliminate consideration of alternative locations. An applicant can satisfy this requirement by simply having a single location within the county.[33] It is the State's interest in providing abundant energy at a reasonable cost to meet the demands of the State that is paramount, not this applicant's project. There is a balance required and here EFSEC lost that balance.

The State Environmental Policy Act (SEPA) requires Environmental Impact Statements to present alternatives to a proposed action with enough information to allow a reasoned choice among the alternatives. *Solid Waste Alternative Proponents v. Okanogan County,* 66 Wn.App. 439, 442, 832 P.2d 503 (1992)(sufficient information is required

[33] Sagebrush Power addresses the "alternative site" element in its brief. Sagebrush Power Brief 40-42. Sagebrush Power does not question or refute the listing of available alternative sites. It simply relies upon interested parties including Tony Usebelli (intervenor CTED representative). The proposition is supported by an interested party advocate that regularly met with EFSEC Chairman regarding energy policy. It is not difficult to comprehend why this testimony may have been influential to EFSEC. No other analysis is provided with respect to alternative locations.

to make a reasoned choice among alternatives); and *Gebbers v. Okanogan County Public Utility District No. 1*, _____ Wn.App. ____, 183 P.3d 324 (2008). In addition, the reasonable alternatives that must be considered are those that could feasibly attain or approximate a proposals objectives, but at a lower environmental cost. SEPA is a procedural statute that does not usurp local decisions but ensures that impacts and alternatives are properly considered by decision-makers. *Bellevue Farm Owners Association v. State of Washington Shorelines Hearings Board,* 100 Wn.App. 341, 354, 997 P.2d 380 (2000); *see also Gebbers, supra.* Similarly, EFSEC is required to consider in good faith whether there are reasonable alternative sites in the county for the proposed wind energy facility before it may preempt local land use regulations. Preemption without examining whether there are feasible alternative locations for a facility is detrimental to the public because it does not explore whether another location would accommodate the publics needs at a lower cost. Therefore, EFSEC's failure to comply with WAC 463-28-040 by not sufficiently evaluating alternative facility sites resulted in improper exercise of its preemption powers.

## IV. CONCLUSION

Residents Opposed to Kittitas Turbines and Lathrop request that the Governor's site certification for Kittitas Valley Wind Power Project be

reversed and remanded for further action consistent with the court's determination.

Dated this ____ day of June, 2008.

By: _____
James C. Carmody WSBA 5205

By: _____ for #26084
Jeff Slothower WSBA 14526

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